IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 1978

NO. 78-400

ANTHONY HAHN-DiGUISEPPE,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

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NO._____

ANTHONY KAHN-DiGUISEPPE,

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THE PEOPLE OF THE STATE OF NEW YORK

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

To the Honorable, the Chief Justice
and the Associate Justices of the
Supreme Court of the United States

Petitioner prays that a writ of certiorari be issued to review the order and judgment of the Court of Appeals of the State of New York entered in the above entitled matter on the 15th day of June, 1978 (not yet officially reported).

A. OPINION BELOW

On June 15, 1978 the New York Court of Appeals handed down its opinion wherein that Court unanimously affirmed the convictions of petitioner and his co-appellant. Said opinion (not yet officially reported) is appended to this petition as Appendix B.

The Appellate Division (First Department_ of the New York Supreme Court had also reviewed the convictions. That Court, (one Justice dissenting) had affirmed the said conviction on April 14, 1977. The opinion of that Court, and the dissenting opinion are appended to this petition as Appendix C.

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment sought to be reviewed herein is the judgment and order of the New York Court of Appeals made on June 15, 1978 and appended hereto as Appendix A.

Jurisdiction in this Court is invoked under Title 28, U.S. Code, Section 1257(3) and Rule 19, Subdivision 1 of the Rules of this Court.

C. THE QUESTION PRESENTED FOR REVIEW

1. Did the trial Court's conceded error in its charge on the defense of agency operate to deprive petitioner of due process of law and the constitutional right to have the jury decide the validity of his defense according to established law?

2. Did the trial Court's erroneous charge also operate to deprive petitioner of the constitutional right to equal protection of the laws?

3. Did the trial Court's refusal to replace the biased juror with an alternate juror constitute a violation of due process of law and a deprivation of the petitioner's constitutional right to trial by an unbiased jury?

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this petition are the right to equal protection of the laws and to due process of law under The Fourteenth Amendment of The United States Constitution and the right to trial by impartial jury under The Sixth Amendment to The United States Constitution. The pertinent portions thereof are set forth in Appendix D of this petition).

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

(a) Statement of the Case

Petitioner and his co-defendant were convicted after jury trial in The Supreme Court of The State of New York on June 11, 1976 in The County of New York of Criminal Sale of a controlled Substance in The Second Degree (New York Penal Law, § 220.41). Each was sentenced to a prison term of six (6) years to life. Each is presently incarcerated pursuant thereto.

Upon timely appeal to The Appellate Division of The New York Supreme Court (1st Dept.) the conviction was upheld on April 14, 1977 by a divided Court, one Justice dissenting.

Upon timely appeal to The New York Court of Appeals, that Court, on June 15, 1978, affirmed the convictions below.

(b) Material Facts

Petitioner and his co-defendant were jointly tried by a jury and convicted of criminal sale of a controlled substance. The sale was allegedly made to an undercover police officer by the co-defendant. Upon the trial, petitioner asserted the defense of agency in that his participation was merely that he was acting solely as the agent of the buyer, an undercover police officer. Such a defense is cognizable under New York Law and, if established, entitles the defendant to an acquittal.

The trial Court recognized that the evidence authorized the jury to determine

that issue and, accordingly, charged the jury to that effect. The Court, however, in expounding on the underlying law with regard to the defense of agency erroneously told the jury that "if he (petitioner) received or is promised any advantage, benefit or compensation for his part, he is not an agent."

The New York Court of Appeals acknowleged in its opinion that this charge was error, but declined to reverse the conviction because "The error was not preserved by objection at trial."

For the reasons hereinafter advanced, it is our contention that such a position at least in a criminal case ignores the mandates of The Sixth and Fourteenth Amendments.

Another event occured at the trial unrelated to the foregoing aspect.

It appears that one of the jurors, on leaving the jury box at the end of the day, followed in close proximity by some of the

other jurors, stopped alongside the table at which the defendants and counsel for the co-defendants and counsel were sitting and stated (apparently to counsel for the co-defendant), "I hate you". At this state of the case both sides had rested and were to sum up the next day.

Immediately thereafter the defense moved for a mistrial or in the alternative that the juror be replaced by an available alternate juror. These motions were denied. An alternative was then suggested that the Court question the juror on her return to Court the next morning. The Court also denied that request, remarking, "How can you tell whether she was being truthful or not?".

On the following morning, the Court stated he would question the juror. At this point counsel for the co-defendant stated that since he was preparing to sum up, to question the juror at this point would possibly antagonize the juror.

The Court then stated he would not dismiss the juror without an explanation. Counsel than stated he was not withdrawing the objection but nonetheless preferred that the Court refrain from conducting a hearing at that stage. The Court thereupon declined to replace the juror.

In this regard it is our contention that petitioner was deprived of a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to The United States Constitution.

Additional facts are set forth in detail in the opinions below and, accordingly, are not reiterated here.

F. THE STAGES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED.

The issue dealing with the charge of the Court regarding the defense of agency was raised upon each of the appeals in The State Courts.

The issue dealing with the prejudicial misconduct of the juror was raised upon the

trial, and by post-verdict, presentence motion to set aside the verdict, and was also raised on each of the appeals in The State Courts.

G. ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(see next page)

POINT ONE

THE TRIAL COURT'S CONCEDEDLY ERRONEOUS CHARGE TO THE JURY, LEFT UNCORRECTED BY THE STATE, AMOUNTS TO A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, AND EQUAL PROTECTION OF THE LAWS, AND TRIAL BY A JURY ACCORDING TO LAW.

Petitioner's entire defense rested upon his contention that the prosecution's evidence itself establish that he was acting solely as an agent of the buyer who was an undercover police officer acting for the State. Under the law of New York, such a defense entitled him to be acquitted, (People vs. Lindsey, 16 A.D. 2d 805, affd. 12 N.Y. 2d 958; People vs. Silverman 23 A.D. 2d 947).

The trial court also recognized the validity of such a defense under the evidence presented by the prosecution and, accordingly, so instructed the jury.

In the course of delivering it's charge the Court flatly and erroneously stated:

> "If he received or is promised any advantage, benefit or compensation for his aprt, he is not an agent.

The New York Court of Appeals, in its opinion below held that such a charge was error. A new trial would have been ordered by The Appellate Courts were it not for the fact that apparently neither the trial court nor defense counsel noticed the error at the time.

Thus, from the outset of the jury's deliberations, the jury deciding petitioner's

fate on a legal hypothesis which was not only adverse to petitioner's defense but was contrary to law! The trial court by its action had in effect told the jury to convict petitioner when by law it should have authorized an acquittal. By this State-Sanctioned instruction the jury was precluded from rendering a verdict according to law. (People vs. Valentine, 55 A.D. 2d 585, (1st Dept. 1976) People vs. Bostick, 51 A.D. 2d 749, (2nd Dept. 1976). The State of New York thereby abandoned - albeit inadvertently - all semblance of due process of law. Our constitutional precepts ought not to be allowed to be attenuated in this fashion.

As pointed out in Suhay vs. U.S. 95 F. 2d 890, 893, (10 Cir. 1938):

> "In a criminal case, it is always a duty of the court to instruct on all essential questions of law, requested or not."

See, also, Morris vs. U.S. 156 F 2d 525 (9 Cir. 1946).

We do not, however, rely upon the foregoing alone. The United States Constitution, (Fourteenth Amendment) places yet another obligation upon The State and its courts. Due and owing to petitioner is the guarantee that he will receive equal protection of the laws.

The very same Appellate Division which affirmed the instant conviction, reached the opposite conclusion on an identical charge to the jury in People vs. Rodriquez, 56 A.D. 2d 545, 391 N.Y.S. 2d 591, 592, (1st Dept. 1977) decided two months prior to deciding the instant case. In Rodriquez the court reversed and ordered a new trial, stating:

> "This Court has recently held it error to charge that financial or personal gain to the defendant precludes the defense of being an agent of the buyer,"***
>
> "The defendant did not except as to this portion of the charge, but this was the main issue in the case and the error is so substantial that we think it deprived the defendant of a fair trial and justifies our exercise four powers under CPL Section 470.15, subd, 6, to notice the error notwithstanding the failure to except."

In the instant case the defense of agency was also the main issue in the case. The underlying issue for the jury was the same. The error in the charge to the jury was the same. The failure to except to the charge was the same. Yet the result in law was diametrically opposite in the same court. Rodriquez was granted a new trial. DiGuiseppe was denied a new trial and now languished in jail. DiGuiseppe was entitled to the same rule of law as Rodriquez.

The basic principle of Constitutional law, expounded a century ago in Missouri vs. Lewis, 101 U.S. 22, 31 still obtains and should apply to the benefit of this petitioner. Mr. Justice Bradley, addressing himself to the equal protection clause, wrote:

> "It means that no person or class or persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In this aspect of the case a classic dilemma rears its head. As the New York Court of Appeals wrote in its opinion:

> "As to DiGuiseppe the agency charge was erroneous, but the error was not preserved by objection at trial."

In raising the question of preservation for review of the trial court's erroneous charge to the jury, we are not unaware that other than in a capital case, a failure to except to the charge ordinarily precluded The New York Court of Appeals from reviewing the charge to the jury. (CPL § 470.05; People vs. Patterson, 39 N.Y. 2d 288, 383, N.Y.S. 2d 573).

Even so, as indicated in Patterson, supra, there are exceptions, as where there is a "deprivation of a fundamental constitutional right." (People vs. McLucas, 15 N.Y. 2d 167, 172, 256 N.Y.S. 2d 799, 802).

We respectfully submit that such an exception should obtain in the instant case. It must not be overlooked that appellant's entire defense was one of agency. The trial Court, apparently without realizing it, took away the entire defense. By this error appellant was left defenseless by operation of erroneous law. That counsel was equally unaware of the Court's error should not militate against a lay defendant in these circumstances.

As Judge Jansen teaches in Patterson, at 39 N.Y. 2d pp. 295-296:

> "As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of

> procedure mandated by Constitution and Statute. Where the procedure adopted by the Court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted."

The Criminal Procedure Law, §300.10, mandates, inter alia:

> "The Court must also state the material legal principles applicable to the particular case and, so far as practicable, explain the application of the law to the facts..."

The right to a defense is fundamental to our constitutional philosophy of due process of law. The Court is mandated by law to protect that defense by correctly instructing the jury on the law -- particularly when the correct law goes to the very heart of that defense. (C.PP.L. §300.10). The trial Court's error deprived appellant of a fair trial.

POINT TWO

THE TRIAL COURT'S REFUSAL TO REPLACE THE BIASED JUROR WITH AN AVAILABLE ALTERNATE JUROR WAS A VIOLATION OF DUE PROCESS OF LAW AND RESULTED IN A DEPRIVATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO TRIAL BY AN UNBIASED JURY.

It is axiomatic that the constitutional right to trial by jury in a criminal case means not any jury but, an impartial and unbiased jury (U.S. v. Wood, 299 U.S. 123,57 S. Ct. 177, rehearing denied 299 U.S. 624, 57 S. Ct. 319) In that case Chief Justice Hughes observed at 299 U.S. 145-146:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, The Constitution lays down no particular tests, and the procedure is not chained to any ancient and artificial formula."

It is clear from the record in the case at law, that one of the jurors expredded her hatred of either a defendant or his counsel or some combination thereof. Once the situation was immediately brought to the trial Court's attention, there devolved

upon the Court, as an agency of the State, a duty to take proper action. Under the circumstances presented the Court realistcally had two courses of action, viz, declare a mistrial or at the very least, replace the biased juror with one of the unbiased alternate jurors.

To hold a hearing as to the juror's state of mind would have been an excerise in futility--- a fact which the Court itself recognized when in denying a hearing it remarked, "How can you tell whether she was she was being truthful or not?" If, upon a hearing, it appeared the juror was in fact biased she would perforce be replaced by an available alternate juror. Conversely, if the juror claimed the remark was made in jest, there would still be left the nagging question just quoted. Moreover- and worse yet-- of the Court still insisted on keeping such a juror there was the serious and almost inevitible danger that such

a juror would now become antagonistic to the defense.

As noted in U.S. v. Spock, 416F,2d 165, 182, (1st Cir; 1969):

"The Constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury, unfettered directly or indirectly."

This guarantee could have been afforded to this petitioner by the simplest an fairest approach, namely, by replacing the offending juror with one of the alternates who sat in the jury box with the other jurors for precisely that purpose. Mr. Justice Kupferman, dissenting below put it succinctly:

"A juror should have no occasion to make a remark to counsel, even in jest. The court could have excused that juror and avoided any possible prejudice by seating an available alternate. Defense counsel's perturbation was understandable and his notpursuing the objection should not be considered a waver of it.

"Regardless of the merits of the charges against these defendants, they were entitled to an impartial and unprejudiced jury, and the course pursued had the effect of possibly tainting the result. People v. Cocco, 305 N.Y. 282."

We believe the events affecting the juror's remark to those assembled at the

counsel table were not considered in the light of the basic question as to whether such remarks operated ipso facto to prevent that juror from rendering a fair verdict. In People v. Leonti, 262 N.Y. 256 a murder conviction was reversed and a new trial ordered in the interest of justice where it appeared from post-trial affidavits that a juror had remarked after the verdict that he "wouldn't believe a Sicilian under under oath and none of the juror's would....." It was held that the defendant (a Sicilian) did not receive a fair trial as a result of this remark.

"The New York Court of Appeals wrote Per Curiam at p 258:

"This not a case of refusal to receive evidence of misconduct of a juror for the purpose of impeaching a verdict. (People v. Sprague, 217 N.Y. 373.) As the affidavits stand undenied, they constitute convincing proof that this talesman never was eligible to become a member of the jury, that from the beginning he was disqualified on the ground of prejudice and that his vote for conviction was, therefore, a nullity. (Of. Clark v. United States, 289 U.S. 1)"

In the case at bar there is no dispute that the remark was made by the juror. The trial Court itself acknowledged an inability to test out the truthfulness of the juror's remark or its significance. At best a hearing would have created an irreconcilable question of fact. Even if the juror were to seek to retreat from her statement the doubt would remain. At stake was a jail sentence reaching as far as life imprisonment Surely neither due process of law nor justice was served by mandating her continued presence as a hostile juror. Absent the declaration of a mis-trial, the trial court had a duty to at least seat an alternate juror in her place.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Dated: Brooklyn, N.Y.

August, 1978

Respectfully Submitted,

William Sonenshine

Attorney for Petitioner

AARON E KOOTA, Esq.

Of Counsel

APPENDICES

APPENDIX A

ORDER OF AFFIRMANCE
BY THE NEW YORK
COURT OF APPEALS

COURT OF APPEALS

STATE OF NEW YORK
The Hon. Charles D. Breitel, Cheif Judge, Presiding

No. 195

The People, etc.

Respondent

vs.

Anthony Argibay,

Appellant

The People, etc.

Respondent

vs.

Anthony DiGuiseppe,

Appellant

Opinion in mp 30.

The appellant(s) in the above entitled appeal appeared by Eugene G. Lamb, Esq.

Geller & Cohen, Esq.
The respondent(s) appeared by Robert Morgenthau, Esq., District Attorney, County of New York.

The Court after due deliberation, orders and adjudges that the orders are affirmed. Opinion Per Curiam. All concur, Jasen and Gabrielli, JJ., concurring in the opinion, except in so for as it justifies the concept of the agency defense. (See dissenting opinion by Gabrielli, J. in People v. Roche, _____ NY 2d _____ decided herewith.

The Court further orders that the papers required to be filed and this record of the

proceedings in this court be remitted to the Supreme court, New York County

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the court of Appeals and that the papers required to be filed are attached.

(SEAL)

Joseph W. Bellacosa,/s/
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,

June 15, 1978

APPENDIX B

OPINION OF THE NEW YORK COURT OF APPEALS

Court of Appeals

No. 195

The People &c.,

Respondent,

vs.

Anthony Argibay,

Appellant

The People &c.,

Respondent,

vs.

Anthony DiGuiseppe,

Appellant.

PER CURIAM:

Defendants Anthony Argibay and Anthony DiGuiseppe appeal from affirmances by the Appellate Division, one justice dissenting, of their convictions after jury trial of criminal sale of a controlled substance in the second degree (Penal Law, §220.41).

The principal issue on Argibay's appeal is whether, in a case involving sale of narcotics, the jury must be charged on

agency when the evidence demonstrates that defendant's involvement in the transaction was, at least, that of a middleman or broker. As to DiGuiseppe, who received an agency charge, the issue tendered is whether the charge was correct in precluding the agency defense where defendant received any financial gain in the transaction; that issue is obviated by a failure to object to the charge at trial. Another issue, common to both appeals, is whether the trial court erred in failing to declare a mistrial after learning that a juror had, during the trial, said to counsel for Argibay "I hate you". The court had offered to conduct a voir dire examination of the juror, an offer declined by defense counsel.

The orders of the Appellate Division should be affirmed. No charge on agency is required, or appropriate, when the testimony essential to the verdict in favor of the

People leads to the inevitable conclusion that defendant was not merely accommodating the buyer, but was acting, if not as a principal seller, then at the very least as a middleman or a broker for his supplier. Hence, the court properly declined an agency charge as to Argibay. As to DiGuiseppe, the agency charge was erroneous, but the error was not preserved by objection at trial. While failure to take action on defense counsel's report of juror misconduct would have been error, defendant were not entitled, automatically, to a mistrial. The trial court acted appropriately in offering to conduct a voir dire examination, and defense counsel's refusal of the offer worked a waiver of any error.

Several other issues, raised and briefed by the defendants, have been considered and rejected.

The drug transaction in this case was initiated, according to police testimony, by a telephone call from Joseph DiGuiseppe, brother of appellant Anthony DiGuiseppe, to undercover officer Sievers, on June 6, 1975. Preparations were made for a purchase of one ounce of cocaine that day. Sievers and undercover officer Siebert were introduced to Anthony DiGuiseppe, and the officers were taken to the home of the "connection". The transaction was aborted, however, with the officers waiting in their automobile in front of the connection's home until 1:00 A.M., never having met the connection or entered his apartment. Joseph DiGuiseppe had driven away from the scene, and Anthony DiGuiseppe had not emerged from the connection's building by the time the agents decided to leave.

After two telephone calls exploring

the "foul up" of June 6, Joseph DiGuiseppe agreed to call Sievers when a new transaction had been arranged. On June 13, a week after the aborted "buy", Joseph DiGuiseppe called officer Siebert and made new arrangements. Siebert and Sievers again met the DiGuiseppe brothers, and were taken to the same location. After ascertaining that Sievers had money for the cocaine, defendant Anthony DiGuiseppe accompanied him to defendant Argibay's apartment, where the transaction was to take place. Argibay's supplier was to deliver cocaine soon and Sievers and defendant DiGuiseppe were instructed to wait in the kitchen when he arrived, so they would not see him. The delivery was made, the cocaine was tested and weighed, and after a slight dispute over the weight, Sievers paid Argibay $1,700 and received just less than an ounce of cocaine. Sievers

gave DiGuiseppe a grain "off the top", and then saw money change hands from Argibay to DiGuise-pe. When Sievers asked how he could reach Argibay to purchase more cocaine, he was instructed to deal through Anthony DiGuiseppe.

A week and a half later, Sievers called Anthony DiGuiseppe about an additional purchase, but was told that Argibay was not then interested in selling any drugs. DiGuiseppe offered to get back to Sievers about obtaining cocaine from another source. Time passed without any return call from DiGuiseppe, and Sievers went to Argibay directly to try to make a purchase. Argibay indicated that he was not making enough money to warrant his continued involvement in the narcotics trade, and declined to sell any more cocaine.

Argibay and the DiGuiseppe brothers were arrested and arraigned in September 1975.

Joseph DiGuiseppe pleaded guilty and was accorded youthful offender treatment. Argibay and Anthony DiGuiseppe went to trial, at which the police testimony detailed the narcotics transaction. Argibay, an architecture student at Pratt Institute, called two character witnesses. DiGuiseppe called no witnesses. Neither defendant testified.

On the last day of trial before summations and the charge to the jury, Argibay's trial counsel informed the court that, as the jurors had filed out of the jury room at the end of the day, one of the jurors had stopped in front of him and said "I hate you." Counsel for DiGuiseppe reported that he, too, had heard the remark. A motion was made for a mistrial or, in the alternative, for replacement of the juror by an alternate. When the motion was denied,

an application was made for the court to examine the juror the next morning as to any bias that "would prevent her from rendering a fair verdict." Although the application had been initially denied, the court had reconsidered by the next morning, and offered to question the juror. Counsel for Argibay, however, had changed his mind, and requested the court not to conduct an examination of the juror, even after the court had indicated the juror would not be disqualified unless she was first questioned. Hence, no further inquiry was conducted.

The jury was charged that if they found defendant DiGuiseppe to be solely an agent of the buyer, they should find him not guilty of the sale of the drugs. In explaining the agency charge, however, the court said "if he received or is promised any advantage, benefit or compensation for his part, he is not an agent." No objection was taken to this charge. As to defendant

Argibay, despite a request, no agency charge was given. Each defendant was convicted and sentenced to a term of from six years to life imprisonment. The Appellate Division affirmed, one justice dissenting.

Extended discussions of the juror misconduct issue is not warranted. Had the trial court refused to investigate the juror's remark to defense counsel, reversal might be mandated. But investigation was offered and it was defense counsel, after requesting a voir dire examination only the night before, who declined the next morning to have the examination conducted. the trial court could not be faulted for refusing to disqualify the disputed juror without conducting any inuqiry into the meaning of and the circumstances surrounding the objectionable statement. Hence, when inquiry was declined, defendants waived any rights they might otherwise have had on appeal.

The agency charge submitted to the jury as to DiGuiseppe was arguably error. Since no objection was taken to the charge, however, the error is not preserved.

Preserved for review, and meriting more complete treatement, is the contention that defendant Argibay was entitled to a charge on agency. To sustain such an argument, there must be some view of the evidence on which Argibay may be said to have acted only as an agent for the buyer.

It is argued, with superficial plausibility, that since Argibay was not the ultimate supplier, he might have been acting as an agent of the buyers, the undercover officers. Indeed, Argibay's supplier arrived with a delivery while Sievers was in Argibay's apartment. The mere fact that Argibay was a middleman or a broker, however, is not enough to warrant a charge on agency. Were

there such a rule, even the largest of drug sellers would be entitled to an agency charge, since so many narcotics originate, ultimately, abroad.

All agents are, concededly, a middlemen of sorts. But the converse is not true. A middleman who acts as a broker between a seller and buyer, aiming to satisfy both, but largely for his own benefit, cannot properly be termed an agent of either. Such a middleman is a trader in narcotics, a merchant. He may not be concerned with the particular needs of an individual drug purchaser except to the extent that satisfying those needs affects his illicit business. To call him an agent strains beyong recognition the agency concept.

In the commercial law field, of course, an agent owes a high duty of loyalty to his principal (see Restatement, Agency 2d, SS387-398). While it would be ludicrous to

apply commercial law definitions to the criminal law, the familiar principles are not without limited relevance. The typical intermediary in a narcotics transaction, perhaps especially because of the implications of the transaction's illegality, is not likely to have any strong bond of loyalty to his buyer.

To be an agent of his buyer, a narcotics merchant must be a mere extension of the buyer. He may act to procure what the buyer wants because the buyer has asked him to do so, but not out of any independent desire or inclination to promote the transaction. The applicable standards are developed in greater detail in other cases (People v. Lam Lek Chong, ____NY2d, _____, supra; People v. Roche, _____Ny2d, _____, supra); this case offers, nevertheless, a useful illustration.

None of the testimony at trial supports the inference that defendant Argibay was merely an agent of the police officers. Until the narcotics were actually delivered and paid for, the officers had never met their purported "agent". Argibay in fact, had used the DiGuiseppes as intermediaries to shield him from all contact with his "principal" until the transaction was to be complered. When "agent" and "principal" did finally meet, the "agent" would not allow the police officer, his "principal", to see the supplier, and a dispute over quantity arose between Argibay and the officer. Finally, on a later occasion, Argibay admitted to Sievers that he was leaving the narcotics trade because it had ceased to be financially profitable.

This testimony, uncontroverted as it is by proof or cross-examination, is not reconcilable with the theory that Argibay was acting only as an extension of his buyer.

The argument that the undercover officer might have lied about Argibay's involvement, and that Argibay may have done nothing more than offer his apartment to facilitate the deal between undercover officer Sievers and the ultimate supplier, is not supported by any evidence. It is not even credible speculation or hypothesis. If the testimony of officer Sievers is to be believed at all, and the finder of fact, the jury, evidently believed it, Argibay was a seller of narcotics, and by no inferential process an agent. Hence, no charge to the jury on agency was necessary or appropriate. For identical reasons, no charge on facilitation was required.

Anthony DiGuiseppe presents a useful counterpoint. DiGuiseppe became involved in the transaction when his brother received a telephone call from an undercover officer. The undercover officers were in frequent contact with DiGuiseppe, who eventually

brought them to Argibay's apartment. Yet the undercover officer paid Argibay for the drugs directly, rather than dealing through DiGuiseppe, although DiGuiseppe's involvement did include compensation by, at least, a small quantity of cocaine. Finally, DiGuiseppe was apparently willing to act as a procurer of drugs from sources other than Argibay, indicating, perhaps, more loyalty to the prospective buyer, his supposed "principal", than to any single supplier. While even this testimony does not establish that DiGuiseppe was an agent, it does not appear to be inconsistent with agency, and a jury charge on agency was probably indicated. Only the failure to object to the erroneous charge prevents review in this court.

In sum, an agency charge is not required simply because it appears that a seller of narcotics did not personally grow, import, or manufacture the illicity substance.

If it were, an agency charge would be mandated as a matter of course when sale of narcotics is alleged. Instead, the agency charge should be reserved for cases where there is at least some evidence, however slight, to support the inference that the supposed agent was acting, in effect, as an extension of the buyer.

Accordingly, the orders of the Appellate Division should be affirmed.

* *

Orders affirmed. Opinion Per Curiam. All concur, Jasen and Gabrielli, JJ., concurring in the opinion except insofar as it justifies the concept of the agency defense (see dissenting opinion by Gabrielli, J., in People v. Roche, ____NY2d ____, decided herewith).

Decided June 15, 1978

APPENDIX C

OPINION OF THE
APPELLATE DIVISION
OF THE NEW YORK
SUPREME COURT (1st. Dept.)

MEMORANDUM DECISION BY APPELLATE DIVISION.

Kupferman, J.P., Lupiano, Birns, Markewich,JJ.

4489 The People of the State of New York,
Respondent,

-against-

Anthony Argibay,
Defendant-Appellant

4490 The People of the State of New York,
Respondent,

-against-

Anthony DiGuiseppe,
Defendant-Appellant,

Judgments of the Supreme Court, New York County (Coon, J. and a jury) rendered June 11, 1976, convicting defendants of the crime of Criminal Sale of a Controlled Substance in the Second Degree (Penal Law, §220.41) and sentencing each defendant to a term of six years to life, affirmed.

We adopt the recital of the sequence of events set forth in the dissent, but emphasize, as disclosed by the record, that upon resumption of the trial the next morning, the trial justice stated he wanted to question the juror. Counsel for defendant Argibay, to whom the juror's remark allegedly was directed and who had made the motions for a mistrial or in the altermative for removal of the juror, declined, however, the opportunity to pursue that course, fearing the juror would know he prompted the inquiry and therefore would visit her displeasure upon his client. Counsel for defendant DiGuiseppe agreed with the tactic of defendany Argibay's counsel.

When the court observed that it would not remove the juror without some explanation to her or a satisfactory reason to itself, counsel for Argibay stated: "Then I would suggest... leave her alone, let her sit as a juror, and let us continue with the case... [L]et the woman stay on the jury and let us go ahead.

Counsel for Argibay expressed understanding of the trial justice's professed reluctance to dismiss the juror, and though counsel stated to the Assistant District Attorney that he was not withdrawing his objection, counsel clearly and distinctly expressed a desire that the justice should not question the juror. The justice acceded to this suggestion.

The dissent, in adopting defendants' view that the court's failure to discharge the juror was an error warranting reversal, contends that the court could have excused the juror and avoided any possible prejudice by seating an available alternate.

No one can fail to recognoze the propriety of such action in appropriate circumstances. However, before such step could be taken it was necessary for the court to conduct a hearing in order to determine whether in fact the statement attributed to the juror was made and if so, under what circumstances, and whether it reflected a state of mind on the part of the juror which made it impossible for her to render a verdict fairly and impartially. At the conclusion of a hearing, which could have been conducted privately, that is, out of the presence of other jurors and in the presence of counsel, the court could have excused the juror from further participation in the trial and substituted an alternate, in such manner as to insulate the jury from any

further contact with the juror (see People v. Phillips, 85 Misc 2d 613, 615 affd. 52 A D 2d 758, lv. to app. den. _____N Y 2d_____).

By declining the offer of the court to conduct a hearing, in which all perinent facts could have been established, each counsel dem-

(Continued on next page)

onstrated a willingness to continue to accept the juror as a judge of his client's guilt or innocence (see People v. Winslow, 51 A D 2d 824, 825). By failing to exercise the right to establish the possibility of prejusice at that time, defendants intentionally and voluntarily relinquished a right and opportunity afforded by law to make a showing of prejudice in the part of the juror. Putting it in non-legal terms; having alleged that the deck was stacked, the players declined an invitation to examine the cards. Defendants should not now be heard to complain.

Reliance in the dissent upon People v. Cocco, 305 N. Y. 282, is misplaced, as the remark therein complained of, while known to the court and the prosecutor during trial, was discovered by defense counsel only after verdict and accordingly he had no opportunity to challenge the juror for that reason prior to verdict.

In this case the record does not disclose a showing of prejudice on the part of the juror. Responsibility for the absence of a record upon which a determination of such question could now be made must be fixed upon defendants. Thus, on the record before us we cannot say that defendants were denied a fair and impartial trial.

Defense counsel, by deliberately choosing to abandon the right to a hearing to determine whether the juror's frame of mind was tainted, waived any claim that defendants did not receive a fair and impartial trial (People v. Winslow, supra).

All concur, except Kupferman, J.P., who dissents in the following memorandum

KUPFERMAN, J.P. (dissenting)

It is alleged by counsel for one of the defendants that a juror, leaving the box at the end of the day, stated to him "I hate you". While it is not clear that this was the statement made or whether it was made in jest, there is corroboration that the juror did say something to defense counsel. Immediately thereafter, a motion for a mistrial was made, or in the alternative that the juror be excused and an available alternate seated. The motions were denied. Counsel then asked that the juror be questioned upon the trial's resumption the next morning. This, too, was denied. However, upon the continuation of the trial the next morning the justice presiding stated that he would question the juror. At this point, counsel to whom the remark was directed and who made the motions, stated that, in as much as he was preparing to sum up, he feared to have the juror interrogated because of a possible antoganism which this course might arouse against his client. The justice presiding stated that he could not dismiss the juror without an explanation. Counsel then stated that he was not withdrawing his objection, but that he preferred that the justice presiding not conduct a hearing on the matter at that stage.

A juror should have no occasion to make a remark to counsel, even in jest. The court could have excused that juror and avoided any possible prejudice by seating an available alternate. Defense counsel's perturbation was understandable, and his not pursuing the objection should not be considered a waiver of it.

Regardless of the merits of the charges against these defendants, they were entitled to an impartial and unprejudiced jury, and

the course pursued had the effect of possibly tainting the result. People v. Cocco, 305 N.Y. 282.

ordersfiled.

(Reported at 57 A.D.2d 520, 393 N.Y.S. 2d 713)

APPENDIX D

CONSTITUTIONAL PROVISIONS

U.S. Constitution, sixth Amendment:

"In all crininal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury....."

U.S. Constitution, Fourteenth Amendment:

"Section 1..... nor shall any State deprive any person of life, liberty, or property without due process of law; not deny to any person within it jurisdiction the equal protection of the laws."